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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 27 2007

SRC 06 067 50671

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Dearden
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a research scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner does not qualify for classification either as an alien of exceptional ability or as a member of the professions holding an advanced degree. Thus, the director did not reach the issue of whether the petitioner had established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a statement. For the reasons discussed below, we uphold the director's decision. In addition, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Beyond the decision of the director, we further find that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) provides that the evidence of an advanced degree shall consist of "*an official academic record* showing that the alien has an United States advanced degree or a foreign equivalent degree." (Emphasis added.)

Initially, counsel explained that the petitioner had obtained a baccalaureate and was "expected to graduate with a Ph.D. in a couple of years." The petitioner submitted a July 9, 2004 letter from the University of South Florida advising the petitioner that he had been admitted as a doctoral candidate. The form for this admission indicates that a doctoral candidate must (1) have completed the qualifying examination, (2) have demonstrated the qualifications necessary to successfully complete requirements for the degree, (3) have been continuously enrolled since entering the program, (4) have been enrolled in at least two graduate credits in the semester of the qualifying examination, (5) be enrolled in at least two graduate credits the semester candidacy is approved and (6) have met all of the requirements for candidacy. On January 10, 2006, the director advised counsel that the petitioner did not appear to have an advanced degree and requested evidence as to the petitioner's exceptional ability.

In response, counsel asserted that the materials submitted initially establish that the petitioner's "academic record and accomplishments are equivalent to or above a master's degree in chemistry." Counsel further concludes that "while having a Ph.D. certificate may indicate that a person has obtained a certain degree of academic accomplishments, not having a certificate does not necessarily mean that the person has not made the same level of academic accomplishments." Finally, counsel states that it is "obviously a matter of technicality as a result of the traditional practice of the university" not to issue Master's degrees to Ph.D. candidates as some universities do.

The petitioner submits a February 2, 2006 letter from Professor [redacted], Chair of the Chemistry Department at the University of South Florida, asserting that the petitioner "has had the academic accomplishments that are equivalent to a Master degree in chemistry and is expected to graduate with the Ph.D. in less than one year." In addition, Assistant Professor [redacted] asserts that while the department does not traditionally award Master's degrees to students in the Ph.D. program, the petitioner "indisputably has the credibility [sic] equivalent to or even higher than a Master degree in chemistry."

The director concluded that the petitioner had not submitted "an official academic record" showing that the petitioner has a degree, diploma, certificate or similar award from a college or university. On appeal, counsel asserts that the petitioner has provided "abundant evidence and detailed explanation to prove that [the petitioner's] academic record and accomplishments are equivalent to or above a Master's degree in chemistry." Counsel references the admission to Ph.D. candidacy and the letter from Professo[redacted]

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(A) expressly and unequivocally states that the evidence of an advanced degree "shall consist of an official academic record." The petitioner has not submitted his

official transcript confirming that he had attained an advanced degree as of the date of filing. Even if we accepted the admission to Ph.D. candidacy as an official academic record, it does not explicitly state or even imply that admission to Ph.D. candidacy is limited to Ph.D. students who have completed a Master's degree program. Thus, the admission is not an official academic record documenting receipt of a Master's degree or even the completion of a Master's degree program.

While we do not doubt the credibility of Professor [redacted], his letter is not an official academic record and is dated after the petition was filed. He does not provide the date on which the petitioner had completed a Master's degree program. Significantly, the regulation at 8 C.F.R. § 103.2(b)(2) provides that affidavits are only acceptable evidence once the petitioner has established that both primary evidence and secondary evidence are either unavailable or do not exist. The petitioner has not demonstrated that the required primary evidence relating to this issue, the petitioner's official transcript, is either unavailable or does not exist.[1] Thus, we cannot consider Professor [redacted] letter.[2]

In light of the above, the petitioner has not established that he is a member of the professions holding an advanced degree. Thus, we must next consider whether the petitioner is an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.[3] While the director explained why the petitioner did not meet two of the three criteria claimed, counsel only attempts to rebut one of the director's adverse findings on appeal.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be

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[1] The petitioner would have to document that his official transcript does not exist, not simply that an official transcript documenting his completion of a Master's program does not exist.

[2] The petitioner was placed on notice of the requirement to submit an official academic record by the regulation at 8 C.F.R. § 204.5(k)(3)(1)(A), the director's request for additional evidence and the director's final decision. Thus, we would not consider this document in any future filing relating to this petition. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

[3] The petitioner does not claim to meet or submit evidence relating to any criterion not mentioned in this decision.

considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner submitted his baccalaureate and the evidence discussed above regarding his academic standing at the University of South Florida. The director concluded that the petitioner had not submitted an official academic record showing that the petitioner had a degree, diploma, certificate or similar award from a college, university, school or other institution of learning. On appeal, counsel raises the objections discussed above. Counsel further asserts that while the petitioner has yet to receive his Ph.D., "the work he has done is no less advanced or significant than that performed by a Ph.D. holder."

In evaluating the evidence submitted to meet *this* criterion, the sole consideration is the degree itself, not the quality of the work performed while studying for the degree. Even if we accepted the petitioner's admission as a doctoral candidate to be an official academic record, the Occupational Outlook Handbook, Department of Labor, 162 (2007), provides that many research jobs for chemists and materials scientists require "a master's degree, or more often a Ph.D." As many chemists and materials scientists possess a Ph.D., we are not persuaded that the petitioner's admission to doctoral candidacy is, in and of itself, indicative of a degree of expertise significantly above that ordinarily encountered in the field of chemistry research. Thus, the petitioner has not established that he meets this criterion.

Evidence of membership in professional associations

Initially and in response to the director's request for additional evidence, the petitioner submitted evidence of his membership in the American Chemical Society, which has more than 158,000 members "at all degree levels," and the American Association for the Advancement of Science, which has over 143,000 members including "others interested in science and technology." The director concluded that these memberships were not indicative of exceptional ability.

Counsel does not contest the director's finding on this issue and we concur with the director. Membership in a professional association that is open to anyone in the field with any amount of experience or education or especially in an association open to anyone with an interest in science and technology is not indicative of a degree of expertise significantly above that ordinarily encountered in the field. Thus, the petitioner has not established that the petitioner meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

In response to the director's request for additional evidence, counsel asserts that the petitioner meets this criterion through the minimal to moderate citation of his articles and the selection of his article in *Angewandte Chemie* as a "Hot Paper." The director did not contest that the petitioner meets this

criterion. As stated above, however, the petitioner must meet at least three criteria to establish eligibility. The petitioner falls far short of meeting any of the other regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii).

As the petitioner has not demonstrated that he is an advanced degree professional or an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, in the interest of fully evaluating the petitioner's eligibility claims, we will address this issue.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

It is apparent that the petitioner works in an area of intrinsic merit, materials science, and that the proposed benefits of his work, (1) improving the performance of functional materials for

pharmaceutical and hydrogen storage purposes and (2) reducing the toxic byproducts from the manufacture of such materials, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner joined the laboratory of Professor [redacted] in 2002 and continued there as of the date of filing. Professor [redacted] explains that his laboratory had made a diverse range of metal-organic compounds with either polymeric or discrete frameworks, including the metal-organic polyhedron nanoball, prior to the petitioner's arrival. Due to the nanoball's size and cavities, its potential applications include biosensing and drug delivery. Dr. [redacted], a senior scientist at TransForm Pharmaceuticals, asserts that crystalline nanomaterials from organic and metal-organic compositions are "widely regarded as promising candidates of new materials" for drug delivery. Dr. [redacted] further asserts that the petitioner's demonstration that it is possible to facilitate the occurrence of polymorphism and supramolecular isomerism through reasonable chemical strategies "will have significant implications for the development of pharmaceuticals and functional materials." Dr. [redacted] does not assert that TransForm Pharmaceuticals or any other pharmaceutical company is investigating the petitioner's materials.

The petitioner also addressed "two of many related issues" that needed to be resolved to make nanoball use feasible: the organization between nanoball molecules and the chemical attractiveness of nanoballs to bio-molecules. By modifying the outer surface of nanoballs using methoxy, the petitioner demonstrated ordered arrangements and improved affinity to bio-molecules. The petitioner also demonstrated that the methoxy-coated nanoballs exhibit permanent porosity. This work has implications for hydrogen storage. Specifically, Dr. [redacted] speculates that this work "represents a promising opportunity that will open up a new horizon of hydrogen storage materials."

In addition, the nanoballs have magnetic properties that "might find applications in areas such as information storage and nanoelectronics."

Professor [redacted] also discusses the petitioner's work with geometric methods, previously limited to one or two types of polygonal/polyhedral building blocks. The petitioner combined three distinct molecular shapes in the same structure. The resulting crystalline materials have an unprecedented periodic framework and uniformly distributed cavities. The petitioner has also successfully adjusted the relative ratio of squares and tetrahedral, thereby adjusting the framework and cavities. This ternary approach is the subject of the petitioner's article published as a "Hot Paper" in *Angewandte Chemie* shortly before the petition was filed. Finally, Professor [redacted] asserts that the petitioner has produced "encouraging preliminary results" indicating that a solventless route to material synthesis may be an environmentally safe and effective alternative.

Dr. [redacted] Director of the Center for Green Manufacturing, praises the petitioner's current work but does not explain how she learned of the petitioner or his work. Dr. [redacted] further asserts that the petitioner's results "have received great response from the scientific community and have facilitated the work of many other scientists." Dr. [redacted] however, does not identify the projects that have been impacted by the petitioner's work or assert that the Center for Green Manufacturing is applying or promoting the petitioner's solventless synthesis results.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of potential applications and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

The record only contains two letters from independent sources. While these letters positively evaluate the petitioner's skills and results, the authors do not explain how they learned of the petitioner's work, or claim to be influenced by the petitioner's work. Nor do they identify any other research team that is

applying the petitioner's results. While several authors attest to the potential applications of the petitioner's work, they do not explain how his work has already influenced the field.

We acknowledge that the petitioner has authored three articles published as of the date of filing and two manuscripts that appear to have been in the process of publication as of the date of filing. We will not presume the influence of an article from the journal in which it appeared. Rather, it is the petitioner's burden to demonstrate the impact of the individual articles. One of the petitioner's articles had been moderately cited as of the date of filing. A review of the citations, however, reveals that most of the articles that cite the petitioner's article cite it as one of several examples of work in the area. None of the citing articles single out the petitioner's work as breakthrough or fundamental to the research now being reported. While the petitioner's work was deemed sufficiently promising for designation as a "Hot Paper," the petitioner must demonstrate its actual impact. It remains, his "Hot Paper" was published only two months prior to the filing of the petition and had yet to have an opportunity to influence the field. While two independent research teams cited this article in early 2006, the petitioner must establish his eligibility as of the date of filing in December 2005. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. While the evidence demonstrates that the petitioner is a talented researcher with potential, it appears that the petition was filed prematurely, before the petitioner had even completed his education and training and had had a meaningful opportunity to influence the field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.